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SENATE BILL 29

54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019

INTRODUCED BY

Michael Padilla

AN ACT

RELATING TO PROCUREMENT; ENACTING THE RESIDENT BUSINESS SET-
ASIDE ACT; REQUIRING THAT THIRTY-THREE PERCENT OF STATE
GOVERNMENT CONTRACTS BE AWARDED TO RESIDENT BUSINESSES;
PROVIDING FOR RULEMAKING; REQUIRING REPORTING; INCLUDING
BUSINESSES OWNED BY AN INDIAN NATION, TRIBE OR PUEBLO AS
RESIDENT BUSINESSES; PROVIDING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--Sections 1
through 6 of this act may be cited as the "Resident Business
Set-Aside Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
Resident Business Set-Aside Act:

A. "contracting agency" means a department,
commission, council, board, committee, institution, agency,

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1 government corporation or official of the executive,
2 legislative or judicial branch of state government;

3 B. "department" means the general services
4 department;

5 C. "executive branch contracting agency" means a
6 department, commission, council, board, committee, institution,
7 agency, government corporation or official of the executive
8 branch of state government;

9 D. "resident business" means a business or
10 contractor that has a valid resident business or resident
11 contractor certificate issued by the taxation and revenue
12 department pursuant to Section 13-1-22 NMSA 1978;

13 E. "set-aside contract" means:

14 (1) a contract for items of tangible personal
15 property, equipment, construction, services or professional
16 services that is designated as a contract for which bids or
17 proposals are solicited only from a resident business; or

18 (2) a portion of a contract that is designated
19 as a portion for which bids or proposals are solicited and
20 accepted only from a resident business; and

21 F. "tangible personal property" means tangible
22 property other than real property that has a physical
23 existence, including supplies, equipment, materials and printed
24 materials.

25 SECTION 3. [NEW MATERIAL] CONTRACTING AGENCIES--

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1 REQUIREMENTS--DESIGNATION OF SET-ASIDE CONTRACTS.--

2 A. A contracting agency shall award at least
3 thirty-three percent of the total number of its contracts,
4 regardless of whether those contracts were awarded pursuant to
5 a competitive process, to resident businesses. A contract
6 pursuant to the State Use Act that is awarded to a resident
7 business shall be included in the contracting agency's
8 calculation pursuant to this subsection.

9 B. A contracting agency shall develop an annual
10 plan for how it will achieve the purpose and requirements of
11 the Resident Business Set-Aside Act.

12 C. A contracting agency may designate a contract,
13 or a portion thereof, as a resident business set-aside contract
14 pursuant to the Resident Business Set-Aside Act if there is a
15 reasonable expectation that bids or proposals may be obtained
16 from at least three qualified resident businesses that are
17 capable of furnishing the desired items of tangible personal
18 property, equipment, construction, services or professional
19 services at a fair and reasonable price. The designation of
20 the contract shall be made before the contracting agency
21 solicits bids or proposals.

22 D. If the department and an executive branch
23 contracting agency disagree as to the designation of a resident
24 business set-aside contract or the requirement that a resident
25 business subcontractor perform work on a portion of a contract,

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1 the dispute shall be submitted to the state auditor for a final
2 determination within twenty-one days of receipt of written
3 notice of the disagreement.

4 E. If the implementation of the purpose or
5 provisions of the Resident Business Set-Aside Act would
6 jeopardize the state's participation in a program from which
7 the state receives federal funds or other benefits, a
8 contracting agency may withdraw the affected contracts from
9 consideration or calculation of a contracting agency's resident
10 business contract awards.

11 F. In carrying out the provisions of this section,
12 an executive branch contracting agency shall consult with the
13 department.

14 SECTION 4. [NEW MATERIAL] ANNUAL REPORT.--

15 A. An executive branch contracting agency shall
16 submit an annual report to the department on or before the
17 deadline established by the department. On or before July 1 of
18 every year:

19 (1) the legislative branch of state government
20 shall publish an annual report on the New Mexico legislature
21 website and the sunshine portal; and

22 (2) the judicial branch of state government
23 shall publish an annual report on the New Mexico courts website
24 and the sunshine portal.

25 B. An annual report shall include:

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1 (1) the total number of contracts awarded to a
2 resident business and the total dollar value of those
3 contracts;

4 (2) the total number of contracts for which a
5 portion of the contract work was performed by a resident
6 business and the total dollar value of the work performed
7 pursuant to those contracts;

8 (3) the total number of resident business set-
9 aside contracts designated and awarded and the total dollar
10 value of those contracts;

11 (4) the percentage of total procurement that
12 was awarded to a resident business; and

13 (5) the efforts made to publicize and promote
14 procurement pursuant to the Resident Business Set-Aside Act.

15 C. The department shall analyze the reports
16 submitted or published pursuant to this section and, using the
17 report data, shall prepare and submit an annual report to the
18 governor and to the legislature and for publication on the
19 sunshine portal by November 1 of each year, beginning in 2020,
20 to show whether the purpose and the directives of the Resident
21 Business Set-Aside Act were met during the preceding fiscal
22 year.

23 SECTION 5. [NEW MATERIAL] CONSULTATION WITH INDUSTRY.--

24 The department shall consult at least every six months with
25 representatives from industries affected by the Resident

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1 Business Set-Aside Act to ensure effective implementation of
2 that act.

3 SECTION 6. [NEW MATERIAL] RULES.--The department shall
4 promulgate rules necessary to implement the provisions of the
5 Resident Business Set-Aside Act.

6 SECTION 7. Section 13-1-22 NMSA 1978 (being Laws 1969,
7 Chapter 184, Section 1, as amended) is amended to read:

8 "13-1-22. RESIDENT BUSINESS, RESIDENT VETERAN BUSINESS,
9 RESIDENT CONTRACTOR AND RESIDENT VETERAN CONTRACTOR
10 CERTIFICATION.--

11 A. To receive a resident business or resident
12 veteran business preference pursuant to Section 13-1-21 NMSA
13 1978 or a resident contractor or resident veteran contractor
14 preference pursuant to Section 13-4-2 NMSA 1978, a business or
15 contractor shall submit with its bid or proposal a copy of a
16 valid resident business certificate, valid resident veteran
17 business certificate, valid resident contractor certificate or
18 valid resident veteran contractor certificate issued by the
19 taxation and revenue department.

20 B. An application for a resident business
21 certificate shall include an affidavit from a certified public
22 accountant setting forth that the business is licensed to do
23 business in this state and that:

24 (1) the business has paid property taxes or
25 rent on real property in the state and paid at least one other

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1 tax administered by the state in each of the three years
2 immediately preceding the submission of the affidavit;

3 (2) if the business is a new business, the
4 owner or majority of owners has paid property taxes or rent on
5 real property in the state and has paid at least one other tax
6 administered by the state in each of the three years
7 immediately preceding the submission of the affidavit and has
8 not applied for a resident business or resident contractor
9 certificate pursuant to this section during that time period;

10 (3) if the business is a relocated business,
11 at least eighty percent of the total personnel of the business
12 in the year immediately preceding the submission of the
13 affidavit were residents of the state and that, prior to the
14 submission of the affidavit, the business either leased real
15 property for ten years or purchased real property greater than
16 one hundred thousand dollars (\$100,000) in value in the state;
17 [~~or~~]

18 (4) if the business is a previously certified
19 business or was eligible for certification, the business has
20 changed its name, has reorganized into one or more different
21 legal entities, was purchased by another legal entity but
22 operates in the state as substantially the same commercial
23 enterprise or has merged with a different legal entity but
24 operates in the state as substantially the same commercial
25 enterprise; or

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1 (5) if the business is owned by an Indian
2 nation, tribe or pueblo, located wholly or partially in New
3 Mexico, or any of its governmental entities or subdivisions,
4 the business's principal place of business is in the state and
5 at least eighty percent of the total personnel of the business
6 in the year immediately preceding the submission of the
7 affidavit were residents of the state.

8 C. An application for a resident veteran business
9 certificate shall include the affidavit required by Subsection
10 B of this section, an affidavit from a certified public
11 accountant providing the previous year's annual revenues of the
12 resident veteran business and:

13 (1) verification by the federal department of
14 veterans affairs as being either a veteran-owned small business
15 or a service-disabled veteran-owned small business; or

16 (2) verification of veteran status as
17 indicated by the United States department of defense DD form
18 214 of release or discharge from active duty with an honorable
19 discharge or of service-disabled veteran status by the
20 department of veterans affairs and proof that a veteran or
21 veterans own a majority of the business.

22 D. An application for a resident contractor
23 certificate shall include an affidavit from a certified public
24 accountant setting forth that the contractor is currently
25 licensed as a contractor in this state and that:

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- 1 (1) the contractor has:
- 2 (a) registered with the state at least
- 3 one vehicle; and
- 4 (b) in each of the five years
- 5 immediately preceding the submission of the affidavit: 1) paid
- 6 property taxes or rent on real property in the state and paid
- 7 at least one other tax administered by the state; and 2) paid
- 8 unemployment insurance on at least three full-time employees
- 9 who are residents of the state; provided that if a contractor
- 10 is a legacy contractor, the requirement of at least three full-
- 11 time employees who are residents of the state is waived;
- 12 (2) if the contractor is a new contractor, the
- 13 owner or majority of owners has paid property taxes or rent on
- 14 real property in the state and has paid at least one other tax
- 15 administered by the state in each of the five years immediately
- 16 preceding the submission of the affidavit and has not applied
- 17 for a resident business or resident contractor certificate
- 18 pursuant to this section during that time period;
- 19 (3) if the contractor is a relocated business,
- 20 at least eighty percent of the total personnel of the business
- 21 in the year immediately preceding the submission of the
- 22 affidavit were residents of the state and that, prior to the
- 23 submission of the affidavit, the contractor either leased real
- 24 property for ten years or purchased real property greater than
- 25 one hundred thousand dollars (\$100,000) in value in the state;

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1 ~~[or]~~

2 (4) if the contractor is a previously
3 certified contractor or was eligible for certification, the
4 contractor has changed its name, has reorganized into one or
5 more different legal entities, was purchased by another legal
6 entity but operates in the state as substantially the same
7 enterprise or has merged with a different legal entity but
8 operates in the state as substantially the same commercial
9 enterprise; or

10 (5) if the contractor is a business owned by
11 an Indian nation, tribe or pueblo, located wholly or partially
12 in New Mexico, or any of its governmental entities or
13 subdivisions, the business's principal place of business is in
14 the state and at least eighty percent of the total personnel of
15 the business in the year immediately preceding the submission
16 of the affidavit were residents of the state.

17 E. An application for a resident veteran contractor
18 certificate shall include the affidavit required by Subsection
19 D of this section, an affidavit from a certified public
20 accountant providing the previous year's annual revenues for
21 the resident veteran contractor and:

22 (1) verification by the federal department of
23 veterans affairs as being either a veteran-owned small business
24 or a service-disabled veteran-owned small business; or

25 (2) verification of veteran status as

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1 indicated by the United States department of defense DD form
2 214 of release or discharge from active duty with an honorable
3 discharge or of service-disabled veteran status by the
4 department of veterans affairs and proof that a veteran or
5 veterans own a majority of the business.

6 F. The taxation and revenue department shall
7 prescribe the form and content of an application for
8 certification and required affidavit. The taxation and revenue
9 department shall examine the application and affidavit and, if
10 necessary, may seek additional information to ensure that the
11 business or contractor is eligible to receive the certificate
12 pursuant to the provisions of this section. If the taxation
13 and revenue department determines that an applicant is
14 eligible, the department shall issue a certificate pursuant to
15 the provisions of this section. If the taxation and revenue
16 department determines that the applicant is not eligible, the
17 department shall issue notification within thirty days. If no
18 notification is provided by the department, the certificate is
19 deemed approved. A certificate is valid for three years from
20 the date of its issuance; provided that if there is a change of
21 ownership of more than fifty percent, a resident business,
22 resident veteran business, resident contractor or resident
23 veteran contractor shall reapply for a certificate.

24 G. A business or contractor whose application for a
25 certificate is denied has fifteen days from the date of the

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1 taxation and revenue department's decision to file an objection
2 with the taxation and revenue department. The person filing
3 the objection shall submit evidence to support the objection.
4 The taxation and revenue department shall review the evidence
5 and issue a decision within fifteen days of the filing of the
6 objection.

7 H. If, following a hearing and an opportunity to be
8 heard, the administrative hearings office finds that a business
9 or contractor provided false information to the taxation and
10 revenue department in order to obtain a certificate or that a
11 business or contractor used a certificate to obtain a resident
12 business, resident veteran business, resident contractor or
13 resident veteran contractor preference for a bid or proposal
14 and the resident business, resident veteran business, resident
15 contractor or resident veteran contractor did not perform the
16 percentage of the contract specified in the bid or proposal,
17 the business or contractor:

18 (1) is not eligible to receive a certificate
19 or a preference pursuant to Section 13-1-21 or 13-4-2 NMSA 1978
20 for a period of five years from the date on which the taxation
21 and revenue department became aware of the submission of the
22 false information or the failure to perform the contract as
23 specified in the bid or proposal; and

24 (2) is subject to an administrative penalty of
25 up to fifty thousand dollars (\$50,000) for each violation.

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1 I. In a decision issued pursuant to Subsection G or
2 H of this section, the taxation and revenue department or
3 administrative hearings office shall state the reasons for the
4 action taken and inform an aggrieved business or contractor of
5 the right to judicial review of the determination pursuant to
6 the provisions of Section 39-3-1.1 NMSA 1978.

7 J. The taxation and revenue department may assess a
8 reasonable fee for the issuance of a certificate not to exceed
9 the actual cost of administering the taxation and revenue
10 department's duties pursuant to this section.

11 K. The state auditor may audit or review the
12 issuance or validity of certificates.

13 L. For purposes of this section:

14 (1) "legacy contractor" means a construction
15 business that has been licensed in this state for ten
16 consecutive years;

17 ~~[(1)]~~ (2) "new business" means a person that
18 did not exist as a business in any form and that has been in
19 existence for less than three years;

20 ~~[(2)]~~ (3) "new contractor" means a person that
21 did not exist as a business in any form and that has been in
22 existence for less than five years;

23 ~~[(3)] "legacy contractor" means a construction~~
24 ~~business that has been licensed in this state for ten~~
25 ~~consecutive years] and~~

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1 (4) "relocated business" means a business that
2 moved eighty percent of its total domestic personnel from
3 another state to New Mexico in the past five years."

4 **SECTION 8.** That version of Section 13-1-22 NMSA 1978
5 (being Laws 2012, Chapter 56, Section 4, as amended) that is to
6 become effective July 1, 2022 is amended to read:

7 "13-1-22. RESIDENT BUSINESS AND RESIDENT CONTRACTOR
8 CERTIFICATION.--

9 A. To receive a resident business preference
10 pursuant to Section 13-1-21 NMSA 1978 or a resident contractor
11 preference pursuant to Section 13-4-2 NMSA 1978, a business or
12 contractor shall submit with its bid or proposal a copy of a
13 valid resident business certificate or valid resident
14 contractor certificate issued by the taxation and revenue
15 department.

16 B. An application for a resident business
17 certificate shall include an affidavit from a certified public
18 accountant setting forth that the business is licensed to do
19 business in this state and that:

20 (1) the business has paid property taxes or
21 rent on real property in the state and paid at least one other
22 tax administered by the state in each of the three years
23 immediately preceding the submission of the affidavit;

24 (2) if the business is a new business, the
25 owner or majority of owners has paid property taxes or rent on

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1 real property in the state and has paid at least one other tax
2 administered by the state in each of the three years
3 immediately preceding the submission of the affidavit and has
4 not applied for a resident business or resident contractor
5 certificate pursuant to this section during that time period;

6 (3) if the business is a relocated business,
7 at least eighty percent of the total personnel of the business
8 in the year immediately preceding the submission of the
9 affidavit were residents of the state and that, prior to the
10 submission of the affidavit, the business either leased real
11 property for ten years or purchased real property greater than
12 one hundred thousand dollars (\$100,000) in value in the state;
13 [~~or~~]

14 (4) if the business is a previously certified
15 business or was eligible for certification, the business has
16 changed its name, has reorganized into one or more different
17 legal entities, was purchased by another legal entity but
18 operates in the state as substantially the same commercial
19 enterprise or has merged with a different legal entity but
20 operates in the state as substantially the same commercial
21 enterprise; or

22 (5) if the business is owned by an Indian
23 nation, tribe or pueblo, located wholly or partially in New
24 Mexico, or any of its governmental entities or subdivisions,
25 the business's principal place of business is in the state and

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1 at least eighty percent of the total personnel of the business
2 in the year immediately preceding the submission of the
3 affidavit were residents of the state.

4 C. An application for a resident contractor
5 certificate shall include an affidavit from a certified public
6 accountant setting forth that the contractor is currently
7 licensed as a contractor in this state and that:

8 (1) the contractor has:

9 (a) registered with the state at least
10 one vehicle; and

11 (b) in each of the five years
12 immediately preceding the submission of the affidavit: 1) paid
13 property taxes or rent on real property in the state and paid
14 at least one other tax administered by the state; and 2) paid
15 unemployment insurance on at least three full-time employees
16 who are residents of the state; provided that if a contractor
17 is a legacy contractor, the requirement of at least three full-
18 time employees who are residents of the state is waived;

19 (2) if the contractor is a new contractor, the
20 owner or majority of owners has paid property taxes or rent on
21 real property in the state and has paid at least one other tax
22 administered by the state in each of the five years immediately
23 preceding the submission of the affidavit and has not applied
24 for a resident business or resident contractor certificate
25 pursuant to this section during that time period;

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1 (3) if the contractor is a relocated business,
2 at least eighty percent of the total personnel of the business
3 in the year immediately preceding the submission of the
4 affidavit were residents of the state and that, prior to the
5 submission of the affidavit, the contractor either leased real
6 property for ten years or purchased real property greater than
7 one hundred thousand dollars (\$100,000) in value in the state;
8 [~~or~~]

9 (4) if the contractor is a previously
10 certified contractor or was eligible for certification, the
11 contractor has changed its name, has reorganized into one or
12 more different legal entities, was purchased by another legal
13 entity but operates in the state as substantially the same
14 enterprise or has merged with a different legal entity but
15 operates in the state as substantially the same commercial
16 enterprise; or

17 (5) if the contractor is a business owned by
18 an Indian nation, tribe or pueblo, located wholly or partially
19 in New Mexico, or any of its governmental entities or
20 subdivisions, the business's principal place of business is in
21 the state and at least eighty percent of the total personnel of
22 the business in the year immediately preceding the submission
23 of the affidavit were residents of the state.

24 D. The taxation and revenue department shall
25 prescribe the form and content of the application and required

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1 affidavit. The taxation and revenue department shall examine
2 the application and affidavit and, if necessary, may seek
3 additional information to ensure that the business or
4 contractor is eligible to receive the certificate pursuant to
5 the provisions of this section. If the taxation and revenue
6 department determines that an applicant is eligible, the
7 department shall issue a certificate pursuant to the provisions
8 of this section. If the taxation and revenue department
9 determines that the applicant is not eligible, the department
10 shall issue notification within thirty days. If no
11 notification is provided by the department, the certificate is
12 deemed approved. A certificate is valid for three years from
13 the date of its issuance; provided that if there is a change of
14 ownership of more than fifty percent, a resident business or
15 resident contractor shall reapply for a certificate.

16 E. A business or contractor whose application for a
17 certificate is denied has fifteen days from the date of the
18 taxation and revenue department's decision to file an objection
19 with the taxation and revenue department. The person filing
20 the objection shall submit evidence to support the objection.
21 The taxation and revenue department shall review the evidence
22 and issue a decision within fifteen days of the filing of the
23 objection.

24 F. If, following a hearing and an opportunity to be
25 heard, the administrative hearings office finds that a business

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1 or contractor provided false information to the taxation and
2 revenue department in order to obtain a certificate or that a
3 business or contractor used a certificate to obtain a resident
4 business or resident contractor preference for a bid or
5 proposal and the resident business or contractor did not
6 perform the percentage of the contract specified in the bid or
7 proposal, the business or contractor:

8 (1) is not eligible to receive a certificate
9 or a preference pursuant to Section 13-1-21 or 13-4-2 NMSA 1978
10 for a period of five years from the date on which the taxation
11 and revenue department became aware of the submission of the
12 false information or the failure to perform the contract as
13 specified in the bid or proposal; and

14 (2) is subject to an administrative penalty of
15 up to fifty thousand dollars (\$50,000) for each violation.

16 G. In a decision issued pursuant to Subsection E or
17 F of this section, the taxation and revenue department or the
18 administrative hearings office shall state the reasons for the
19 action taken and inform an aggrieved business or contractor of
20 the right to judicial review of the determination pursuant to
21 the provisions of Section 39-3-1.1 NMSA 1978.

22 H. The taxation and revenue department may assess a
23 reasonable fee for the issuance of a certificate not to exceed
24 the actual cost of administering the taxation and revenue
25 department's duties pursuant to this section.

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1 I. The state auditor may audit or review the
2 issuance or validity of certificates.

3 J. For purposes of this section:

4 (1) "legacy contractor" means a construction
5 business that has been licensed in this state for ten
6 consecutive years;

7 [~~1~~] (2) "new business" means a person that
8 did not exist as a business in any form and that has been in
9 existence for less than three years;

10 [~~2~~] (3) "new contractor" means a person that
11 did not exist as a business in any form and that has been in
12 existence for less than five years;

13 [~~3~~] ~~"legacy contractor" means a construction~~
14 ~~business that has been licensed in this state for ten~~
15 ~~consecutive years] and~~

16 (4) "relocated business" means a business that
17 moved eighty percent of its total domestic personnel from
18 another state to New Mexico in the past five years."

19 SECTION 9. EFFECTIVE DATE.--

20 A. The effective date of the provisions of Sections
21 1 through 7 of this act is July 1, 2019.

22 B. The effective date of the provisions of Section
23 8 of this act is July 1, 2022.